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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 91-32)

FUEL OIL BLENDING – CREATION OF A NEW AND DIFFERENT PRODUCT FOR PURPOSES OF THE COASTWISE LAWS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of change of position.

SUMMARY: The U.S. Customs Service has concluded review of its position on fuel oil blending operations in regard to application of the coastwise laws. Customs has considered a fuel oil blending operation which changes the original product in sulfur content, specific gravity, pour point, and viscosity as creating a new and different product. This is significant since foreign-flag vessels are prohibited from transporting merchandise (including oil) between ports in the U.S. unless, prior to delivering the merchandise to its U.S. port of destination, it has been transformed into a new and different product from that which was laden in a U.S. port. Customs was concerned that fuel oil blending operations may not effect such a transformation and published a notice that it was reconsidering its position. After reviewing the comments received and the legal authority, Customs believes that fuel oil blending operations which change the four characteristics mentioned should not automatically be considered as having created a new and different product for purposes of the coastwise laws. Henceforth, prior to reaching such determinations, Customs will require the submission of data on the procedures of, and materials used in, such operations.

EFFECTIVE DATE: April 10, 1991.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Carrier Rulings Branch, 202-566-5706.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title 46, United States Code Appendix, § 883 (46 U.S.C. App. 883), commonly called the Jones Act, provides, in part, that no merchandise

shall be transported between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States.

The case of *American Maritime Association v. Blumenthal*, 590 F.2d 1159 (1978) (hereinafter *Blumenthal*), involved the applicability of 46 U.S.C. App. 883 to the transportation of crude oil by a foreign-flag tanker from Valdez, Alaska, to the U.S. Virgin Islands, and the subsequent transfer of products refined from that oil from the Virgin Islands to the continental U.S. The refining process turned the Alaskan crude oil into eleven different products, each different in name, physical and chemical character, and use, both from each other and from the crude oil. Because of the degree of transformation of the original crude oil brought about by these processes, it was determined that the refining had created new and different products from the Alaskan crude, and therefore their transportation by foreign-flag vessels from the Virgin Islands to the U.S. did not violate § 883.

Section 4.80b, Customs Regulations (19 CFR 4.80b), was promulgated after the *Blumenthal* case to state that merchandise is exempt from the restrictions of the coastwise laws if at an intermediate port or place other than a coastwise point it is manufactured or processed into a new and different product. The transformation of the merchandise is considered as having broken the continuity of the voyage. In applying this section to fuel oil blending operations, Customs has taken the position that such an operation which changed the original product in sulfur content, specific gravity, pour point, and viscosity created a new and different product.

Customs reviewed this position and became concerned that without specific data regarding the procedures of, and materials used in, fuel oil blending operations, it was not possible to determine whether a new and different product had been created. By notice in the Federal Register on November 1, 1989 (54 FR 46075), public comment was solicited concerning the extent to which blending is necessary to create a new and different product within the meaning of § 4.80b(a), or whether some degree of refining is necessary to create such a product. It was proposed to require parties seeking a determination about the effect of fuel oil blending operations to submit information concerning the procedures and specific data of such operations.

Analysis of Comments

The comments received can be grouped into two opposing categories. Representatives of domestic shipping lines and domestic oil refiners were concerned that Customs position on fuel oil blending had become a large loophole in the protection the Jones Act was designed to give to their interests. It was claimed that foreign ports, *e.g.*, those in the Caribbean, had become no more than transhipment stations used to allow lowercost foreign-flag vessels to move fuel oil between coastwise points.

This group would have Customs require refining of fuel oil in order to find a new and different product.

Comments on behalf of foreign-flag vessels and offshore blenders defended the position that a change in sulfur content, specific gravity, pour point, and viscosity brought about by blending did in fact create a new and different product. This group would prefer that any such blending continue to exempt fuel oil from the Jones Act.

COMMENTS IN OPPOSITION TO A CHANGE IN POSITION

Comment:

Those commenters advocating no change in Customs position on fuel oil blending operations believe that changes in the sulfur content, specific gravity, pour point, and viscosity of fuel oil do in fact result in a new and different product for purposes of the coastwise laws. In support of their position, these commenters refer to the *Blumenthal* case in stating that it is the comparative characteristics of the original fuel oil versus the final product, not the process by which these characteristics are changed, that is determinative as to whether a new and different product has been produced.

In this same vein, several commenters advocate looking to the end use of the blended oil and to the "market realities" of how the final product is distributed and priced.

Response:

Making the marketplace the determinative factor in fuel oil blending decisions will lead to differences concerning identical operations because of geographic location or seasonal fluctuation in pricing. Customs will not adopt a position which would lead to decisions dependent on location or fluctuating economic factors. Further, it is apparent that *Blumenthal* involved refined products and not a blending operation. Accordingly, parties seeking a determination concerning the ramifications of a fuel oil blending must submit data sufficient for Customs to assess the degree of change.

Comment:

Several commenters opposing any change to the current position apparently did so based on their predictions of what a new position might require. For example, some commenters opposed a new position which would require refining of oil, or which would set minimum proportions for the constituent materials in a blended fuel oil.

Response:

The modified position Customs is adopting requires neither of these.

Comment:

Two commenters stated that to require parties to produce procedures and specific data of a blending operation prior to Customs determining whether such an operation produces a new and different product is impractical from an industry standpoint. These commenters believe that

market conditions change so quickly in the fuel oil industry that deals will be lost while waiting for Customs to render decisions.

Response:

It is Customs position that proper fuel oil blending determinations require submission of data sufficient to judge the degree of transformation of the original product. Of paramount concern is the administration of 46 U.S.C. App. 883, one of the many navigation laws enforced by Customs. However, in instances when we are informed that expedited treatment of a request is desired, we will respond as quickly as possible. Parties requesting fuel oil determinations should keep in mind that one of the key factors in our response time will be the thoroughness and organization of the information presented to us.

COMMENTS IN FAVOR OF A CHANGE IN POSITION

Comment:

Several commenters wrote expressing support for Customs proposal to require the party seeking a determination regarding a blending operation in relation to § 4.80b(a) to submit the procedures and specific data of such operations to Customs for review and approval prior to engaging in the operation. It is their view that due to the degree of uncertainty in this area and the potential for easy circumvention of § 4.80b(a) under Customs current position, adoption of this proposal is a means by which Customs can better ensure compliance with the Jones Act.

Response:

Customs agrees that requiring submission on the procedures and materials of the operation will allow us to detect, and rule accordingly, on any operation undertaken merely to circumvent the coastwise laws.

Comment:

Many of those favoring a change in position believed Customs should require some degree of refining. These commenters said that blending operations which change sulfur content, specific gravity, pour point, and viscosity are only diluting the physical characteristics of the original product instead of changing its molecular structure which, they maintain, is the test for determining whether a new and different product has been created for purposes of § 4.80b(a). They further state that refining is the only means by which molecular structure can be changed. These commenters cite *Blumenthal* in support of their position.

A similar comment was offered that changes in the four characteristics considered under Customs position are done merely to qualify oil for delivery to certain utilities which are required by environmental regulations to burn a particular type of fuel oil. Instead of those factors, the following tests for judging a fuel oil blending operation were offered: the application of heat which yields a change in chemical structure of the original substance; boiling point range which can also indicate a change in chemical structure; verifiable pressure; a catalytic or other chemi-

cally induced process; intended use of the final product; and changes in the economic value of the final product.

Response:

Customs believes that simply changing our position from one of regarding blending operations as creating new and different products to one of regarding refining operations as accomplishing that task is not supported by the record or by *Blumenthal*. For the same reasons, the price of the final product, or its intended use, cannot be determinative factors.

STATEMENT OF POSITION

After a review of all the comments submitted and the pertinent legal authority, Customs is abandoning the position that a fuel oil blending operation which changes sulfur content, specific gravity, pour point, and viscosity is automatically considered as creating a new and different product for purposes of section 4.80b(a), Customs Regulations. Henceforth, prior to reaching determinations regarding this matter, Customs will require the submission of data on the procedures of, and materials used in, a fuel oil blending operation. While such submissions will be considered on a case by case basis, Customs is cognizant of the holdings in *Blumenthal* and *National Juice Products Association, et al., v. United States*, 628 F. Supp. 978 (1986) and the dicta therein, judicial precedents the application of which might require an adverse decision if the process involved is less than a refining of the product. Customs will review the data and, based on the facts of each operation, rule whether or not the merchandise is subject to the provisions of 46 U.S.C. App. 883.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: April 15, 1991.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, April 10, 1991 (56 FR 14467)]

19 CFR Part 24

(T.D. 91-33)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO USER FEES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document amends the Customs Regulations to reflect the changes to the Customs user fee statute (19 U.S.C. 58c) effected by section 111 of the Customs and Trade Act of 1990, as amended by section 10001 of the Omnibus Budget Reconciliation Act of 1990. These changes include a new fee structure to cover the costs of processing imported merchandise, consisting of an ad valorem rate with maximum and minimum fees in the case of merchandise subject to formal entry or release procedures, a surcharge on merchandise that is formally entered or released through manual procedures, and flat-rate fees for informal entry or release except for certain user fee facilities to which lump sum payments apply. Other changes include the addition of a conditional exemption from the fees for products of Israel, the inclusion of a limitation on the fee chargeable for U.S. agricultural products processed and packed in a foreign trade zone, the inclusion of a provision allowing daily aggregation of the ad valorem fee for temporary monthly entry programs, the inclusion of a provision treating the fees as Customs duties for administrative, enforcement, and judicial purposes, and a modification to the fee limitation applied to the arrival of railroad cars originating and terminating in the same country.

DATES: Interim rule effective April 15, 1991; comments must be received on or before June 14, 1991.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Harry Carnes, Office of Inspection and Control (202-566-8648).

Legal Aspects: William Rosoff, Office of Regulations and Rulings (202) 566-5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99-272, established a schedule of fees chargeable to users of various services provided by the Customs Service in con-

nection with the processing of persons, aircraft, vehicles, railroad cars, vessels, broker permits, and mail arriving in the U.S.. These statutory fees were codified at 19 U.S.C. 58c, and interim implementing Customs regulations were published on June 11, 1986 as T.D. 86-109, 51 FR 21152. The bulk of the interim regulatory provisions implementing those fees are set forth at 19 CFR 24.22.

Section 8101 of the Omnibus Budget Reconciliation Act of 1986, Public Law 99-509, amended the 1985 Act by adding thereto subsections (a)(9) and (10) (19 U.S.C. 58c(a)(9) and (10)) to provide for the assessment of a merchandise processing user fee on formal entries of imported merchandise. This merchandise processing fee was set at 0.22 percent ad valorem for the fiscal year ending on September 30, 1987, and thereafter the fee was to be either 0.17 percent ad valorem or an ad valorem rate established by the Secretary of the Treasury under statutory guidelines; excluded from application of the fee were products provided for in schedule 8 of the tariff schedules (now Chapter 98 of the Harmonized Tariff Schedule of the United States) and products of Caribbean Basin Initiative beneficiary countries, least developed developing countries, or U.S. insular possessions. On December 1, 1986, interim Customs regulations were published as T.D. 86-205, 51 FR 43188, to implement the merchandise processing fee; these interim regulations were set forth at 19 CFR 24.23. In addition, on December 23, 1988, T.D. 89-3 was published at 53 FR 51769 to amend the interim regulations to set forth the staged reductions of the merchandise processing fee applicable to products of Canada under the U.S.Canada Free Trade Agreement.

On August 20, 1990, President Bush signed into law the Customs and Trade Act of 1990, Public Law 101-382 (the Act). Section 111 of the Act sets forth a number of significant changes with regard to Customs user fees. The principal change involves a complete restructuring of the ad valorem fee set forth in 19 U.S.C. 58c(a)(9) and (10) to conform it to the international obligations of the United States under Article VIII of the General Agreement on Tariffs and Trade (GATT). The restructured fee has the following three main elements:

1. An ad valorem fee of 0.17 percent applicable to merchandise that is formally entered or released, subject to a maximum fee of $400 and a minimum fee of $21.

2. A surcharge of $3 in the case of a formal manual entry or release of merchandise, to be added to the ad valorem fee.

3. In the case of informal entries or releases, specific, flat-rate fees of $2 if the entry or release is automated and not prepared by Customs, $5 if the entry or release is manual and not prepared by Customs, and $8 if the entry or release is prepared by Customs. Exceptions are made in the case of a centralized hub facility, an express consignment carrier facility or a user fee airport or other user fee facility, for which payment (equal to the annual reimbursement paid to Customs) is provided in lieu of these specific fees.

The Act also amends 19 U.S.C. 58c(b)(1)(B) to provide that, with effect from July 7, 1986, the pre-existing exemption from the railroad car arrival fee applies with reference to the movement (journey) of the railroad car; thus, the car, rather than the arriving train of which it is a part, must originate and terminate in the same country in order for the exemption to apply. In addition, the Act provides that, with effect from the date of enactment of the Act, any fee provided for under 19 U.S.C. 58c(a) shall be treated as a Customs duty (1) for purposes of applying the administrative and enforcement provisions of the Customs laws and regulations (including for purposes of computing penalties) except in the case of drawback or where otherwise provided in regulations, and (2) for purposes of determining the jurisdiction of any U.S. court or agency. Finally, the Act reinserts the exemption for least developed countries, provides for the daily aggregation of the ad valorem fee for temporary monthly entry programs in effect prior to July 1, 1989, sets forth a limitation on the merchandise fee chargeable for U.S. agricultural products processed and packed in a foreign trade zone, and provides a conditional exemption from the fees for products of Israel.

On November 5, 1990, President Bush signed into law the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508 (the Budget Act). Section 10001 thereof made a number of changes to the user fee provisions of section 111 of the Act, including the following: (1) revision of the definition of a manual entry or release, with effect from November 5, 1990; (2) provision for application of the specific, flat-rate informal fees, rather than the annual reimbursement sum, in the case of a small airport or other user fee facility which handled not more than 25,000 informal entries during the preceding fiscal year, with effect from October 1, 1990; and (3) provision for an adjustment of the ad valorem rate by the Secretary of the Treasury under public notice and Congressional review procedures.

In light of the significant amendments to the Customs user fee statute effected by the Act, as amended by the Budget Act, and in consideration of the fact that those amendments principally took effect on October 1 and November 5, 1990, it is necessary to promulgate implementing regulations at the earliest practicable date. Accordingly, Customs has determined that the implementing regulations should be published as an interim rule with opportunity for public comment. The regulatory amendments are discussed below.

Section 24.17:

This section is being amended to set forth the reimbursement required under law to be paid to Customs for services rendered at centralized hub facilities, express consignment carrier facilities, and user fee airports or other user fee facilities. These provisions thus describe the nature of the reimbursement which is the basis for the fee paid by these facilities in lieu of the informal fees.

Section 24.22:

Paragraph (d)(5) is being revised to set forth the new terms of the railroad car arrival fee exemption.

Paragraph (j) is being added to set forth the provision in the Act regarding the treatment of user fees as a Customs duty for administrative, enforcement, and judicial purposes, which applies to the fees covered by section 24.22. For the sake of clarity, the statutory language has been somewhat simplified in the regulatory text.

Section 24.23:

This section is being extensively revised to set forth the new fee structure for processing merchandise contained in the Act and the Budget Act. The section has also been retitled to reflect the restructuring of the fee.

Paragraph (a) sets forth definitions. The definitions of "centralized hub facility" and "express consignment carrier facility" include the descriptions of those facilities as contained in 19 CFR Part 128. The definition of "manual" formal or informal entry or release reflects the amended Budget Act language, consistent with operational and administrative realities of Customs and the private sector. The definition of "small airport or other facility" is intended to give effect to the Budget Act provision regarding application of the flat-rate informal fees at facilities handling not more than 25,000 informal entries during the preceding year.

Paragraph (b) sets forth the basic terms of the restructured merchandise processing fee.

Paragraph (c) sets forth the exemptions and limitations which apply to the merchandise processing fees. In addition to the exemptions historically provided under the user fee statute and regulation, this paragraph includes an exemption for other cases in which Customs has not applied a merchandise processing fee. It also clarifies the statutory application of the fees to articles of HTSUS subheadings 9802.00.60 and 9802.00.80 and sets forth the provisions in the Act regarding Israeli products and regarding U.S. agricultural products processed and packed in a foreign trade zone.

Paragraph (d) sets forth the provision in the Act regarding the daily aggregation of the ad valorem fee for entries under existing temporary monthly entry programs.

Finally, paragraph (e) sets forth the provision in the Act regarding the treatment of the fees as a Customs duty for administrative, enforcement, and judicial purposes, which is equally applicable to the fees covered by this section.

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C.

552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C..

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because these regulations set forth requirements and procedures of which the public needs to be informed in order to pay the fees required under law, it is determined pursuant to 5 U.S.C. 553(b)(B) that notice and public procedures are impracticable, unnecessary, and contrary to the public interest. Furthermore, for the above reasons and because the regulations set forth requirements effective on October 1 and November 5, 1990, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(3) for dispensing with a delayed effective date.

EXECUTIVE ORDER 12291

Because this document will not result in a "major rule" as defined in E.O. 12291, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Taxes, Wages, User fees.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, Part 24, Customs Regulations (19 CFR Part 24) is amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a-58c, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 31 U.S.C. 9701; Pub. L. 99-662, unless otherwise noted.

2. Section 24.17 is amended by adding paragraphs (a)(12)(14) to read as follows:

§ 24.17 Other services of officers; reimbursable.

(a) * * *

(12) When a Customs officer or employee is assigned to a centralized hub facility for the purpose of processing express consignment shipments under Part 128 of this chapter, the compensation (including overtime) and expenses of such officer or employee shall be reimbursed to the Government by the centralized hub facility.

(13) When a Customs officer or employee is assigned to an express consignment carrier facility for the purpose of processing express consignment shipments under Part 128 of this chapter, the cost (including overtime) of the inspectional services provided by such officer or employee shall be reimbursed to Customs by the express consignment carrier facility.

(14) When a Customs officer or employee is assigned to provide Customs services at an airport or other facility under 19 U.S.C. 58b, the facility shall reimburse to the Government an amount equal to the salary and expenses of such officer or employee (including overtime) plus any other expenses incurred in providing those Customs services at the facility.

3. Section 24.22 is amended by revising paragraph (d)(5) and adding paragraph (j) to read as follows:

§ 24.22 Fees for certain services.

* * * * * * *

(d) * * *

(5) Exemptions. No fee shall be collected under this paragraph for Customs services provided in connection with the arrival of any railroad car whose journey originates and terminates in the same country, provided that no passengers board or disembark from the train and no cargo is loaded or unloaded from the car while the car is within any country other than the country in which the car originates and terminates.

* * * * * * *

(j) *Treatment of fees as Customs duty.*

(1) *Administration and enforcement.* Unless otherwise specifically provided in this chapter, all administrative and enforcement provisions under the Customs laws and regulations, other than those laws and regulations relating to drawback, shall apply with respect to any fee provided for under this section, and with respect to any person liable for the payment of such fee, as if such fee is a Customs duty. For purposes of this paragraph, any penalty assessable in relation to an amount of Customs duty, whether or not any such duty is in fact due and payable, shall be assessed in the same manner with respect to any fee required to be paid under this section.

(2) *Jurisdiction.* For purposes of determining the jurisdiction of any court or agency of the United States, any fee provided for under this section shall be treated as if such fee is a Customs duty.

4. Section 24.23 is revised to read as follows:

§ 24.23 Fees for processing merchandise.

(a) *Definitions.* The following definitions apply for the purposes of this section:

(1) *Centralized hub facility.* A "centralized hub facility" is a separate, unique, single purpose facility normally operating outside of Customs operating hours approved by the district director for entry filing, examination, and release of express consignment shipments, as provided for in Part 128 of this chapter on July 30, 1990.

(2) *Entered or released.* Merchandise is "entered or released" if the merchandise is:

(i) Released under a special permit for immediate delivery under 19 U.S.C. 1448(b);

(ii) Entered or released from Customs custody under 19 U.S.C. 1484(a)(1)(A); or

(iii) Withdrawn from warehouse for consumption.

(3) *Express consignment carrier facility.* An "express consignment carrier facility" is a separate or shared specialized facility approved by the district director solely for the examination and release of express consignment shipments, as provided for in Part 128 of this chapter on July 30, 1990.

(4) *Manual entry or release.* Any reference to a "manual" formal or informal entry or release shall not include:

(i) Any formal or informal entry or release filed by an importer or broker who is operational for cargo release through the Automated Broker Interface (ABI) of the Customs Automated Commercial System (ACS) at any port within the United States;

(ii) Any formal or informal entry or release filed at a port where cargo selectivity is not fully implemented if filed by an importer or broker who is operational for ABI entry summary; or

(iii) Any informal entry or any Line Release filed at a port where cargo selectivity is fully implemented if filed by an importer or broker who is operational for ABI entry summary.

(5) *Small airport or other facility.* A "small airport or other facility" is any airport or other facility which has been designated as a user fee facility under 19 U.S.C. 58b and at which more than 25,000 informal entries were processed during the preceding fiscal year.

(b) *Fees:*

(1) *Formal entry or release:*

(i) *Ad valorem fee:*

(A) *General.* Except as provided in paragraph (c) of this section, merchandise that is formally entered or released is subject to the payment to Customs of an ad valorem fee of 0.17 percent. The fee shall be due and payable to Customs by the importer of record of the merchandise at the time of presentation of the entry summary and shall be based on the value of the merchandise as determined under 19 U.S.C. 1401a.

(B) *Maximum and minimum fees.* Subject to the provisions of paragraphs (b)(1)(ii) and (d) of this section relating to the surcharge and to

aggregation of the ad valorem fee respectively, the ad valorem fee charged under paragraph (b)(1)(i)(A) of this section shall not exceed $400 and shall not be less than $21.

(ii) *Surcharge for manual entry or release.* In the case of any formal manual entry or release of merchandise, a surcharge of $3 shall be assessed and shall be in addition to any ad valorem fee charged under paragraphs (b)(1)(i)(A) and (B) of this section.

(2) *Informal entry or release:*

(i) Except as provided in paragraphs (b)(2)(ii) and (c) of this section, merchandise that is informally entered or released is subject to the payment to Customs of a fee of:

(A) $2 if the entry or release is automated and not prepared by Customs personnel:

(B) $5 if the entry or release is manual and not prepared by Customs personnel; or

(C) $8 if the entry or release, whether automated or manual, is prepared by Customs personnel.

(ii) With respect to the processing of merchandise that is informally entered or released at a centralized hub facility, an express consignment carrier facility, or a small airport or other facility, the following payments shall be made in lieu of the specific fees provided for in paragraph (b)(2)(i) of this section:

(A) In the case of a centralized hub facility or small airport or other facility, payment by the facility in an amount equal to the reimbursement (including overtime) which the facility is required to make during the fiscal year under § 24.17 of this chapter; and

(B) In the case of an express consignment carrier facility, payment by the facility in an amount equal to the cost (including overtime) of the Customs inspectional services provided at the facility during the fiscal year for which Customs is reimbursed under § 24.17 of this chapter.

(c) *Exemptions and limitations:*

(1) The ad valorem fee, surcharge, and specific fees provided for under paragraphs (b)(1) and (b)(2)(i) of this section shall not apply to:

(i) Except as provided in paragraph (c)(2) of this section, articles provided for in Chapter 98, Harmonized Tariff Schedule of the United States (HTSUS; 19 U.S.C. 1202);

(ii) Products of insular possessions of the U.S. (General Note 3(a)(iv), HTSUS);

(iii) Products of beneficiary countries under the Caribbean Basin Economic Recovery Act (General Note 3(c)(v), HTSUS);

(iv) Products of least-developed beneficiary developing countries (General Note 3(c)(ii)(B), HTSUS); and

(v) Merchandise described in General Note 4, HTSUS, merchandise released under 19 U.S.C. 1321, and merchandise imported by mail.

(2) In the case of any article provided for in subheading 9802.00.60 or 9802.00.80, HTSUS:

(i) The surcharge and specific fees provided for under paragraphs (b)(1)(ii) and (b)(2)(i) of this section shall remain applicable; and

(ii) The ad valorem fee provided for under paragraph (b)(1)(i) of this section shall be assessed only on that portion of the cost or value of the article upon which duty is assessed under subheadings 9802.00.60 and 9802.00.80.

(3) In the case of goods originating in Canada within the meaning of General Note 3(c)(vii), HTSUS, the ad valorem fee, surcharge, and specific fees provided for under paragraphs (b)(1) and (b)(2)(i) of this section shall be assessed according to the following schedule:

(i) With respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1990, the amount shall be 80 percent of the amount otherwise applicable on that date;

(ii) With respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1991, the amount shall be 60 percent of the amount otherwise applicable on that date;

(iii) With respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1992, the amount shall be 40 percent of the amount otherwise applicable on that date;

(iv) With respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1993, the amount shall be 20 percent of the amount otherwise applicable on that date; and

(v) With respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1994, no fee or surcharge shall be assessed.

(4) In the case of agricultural products of the U.S. that are processed and packed in a foreign trade zone, the ad valorem fee provided for under paragraph (b)(1)(i) of this section shall be applied only to the value of any material used to make the container for such merchandise, but only if that merchandise is subject to entry and the container is of a kind normally used for packing such merchandise.

(5) The ad valorem fee, surcharge, and specific fees provided for under paragraphs (b)(1) and (b)(2)(i) of this section shall not apply to products of Israel that are entered, or withdrawn from warehouse for consumption, on or after the effective date of a determination made under section 112 of the Customs and Trade Act of 1990.

(d) *Aggregation of ad valorem fee:*

(1) Notwithstanding any other provision of this section, in the case of entries of merchandise made under any temporary monthly entry program established by Customs before July 1, 1989, for the purpose of testing entry processing improvements, the ad valorem fee charged under paragraph (b)(1)(i) of this section for each day's importations at an individual port shall be the lesser of the following, provided that those importations involve the same importer and exporter:

(i) $400; or

(ii) the amount determined by applying the ad valorem rate under paragraph (b)(1)(i)(A) of this section to the total value of such daily importations.

(2) The fees as determined under paragraph (d)(1) of this section shall be paid to Customs at the time of presentation of the monthly entry summary. Interest shall accrue on the fees paid monthly in accordance with section 6621 of the Internal Revenue Code of 1986.

(e) *Treatment of fees as Customs duty:*

(1) *Administration and enforcement.* Unless otherwise specifically provided in this chapter, all administrative and enforcement provisions under the Customs laws and regulations, other than those laws and regulations relating to drawback, shall apply with respect to any fee provided for under this section, and with respect to any person liable for the payment of such fee, as if such fee is a Customs duty. For purposes of this paragraph, any penalty assessable in relation to an amount of Customs duty, whether or not any such duty is in fact due and payable, shall be assessed in the same manner with respect to any fee required to be paid under this section.

(2) *Jurisdiction.* For purposes of determining the jurisdiction of any court or agency of the United States, any fee provided for under this section shall be treated as if such fee is a Customs duty.

CAROL HALLETT,
Commissioner of Customs.

Approved: April 28, 1991.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, April 15, 1991 (56 FR 15036)]

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19 CFR Part 12

(T.D. 91-34)

IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL ARTIFACTS FROM GUATEMALA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by imposing emergency import restrictions on pre-Columbian culturally significant archaeological artifacts from the Peten region of Guatemala.

These restrictions are being imposed pursuant to a Determination of the United States Information Agency issued under authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

EFFECTIVE DATE: April 15, 1991.

FOR FURTHER INFORMATION CONTACT:

Legal Aspects: Donnette Rimmer, Intellectual Property Rights Branch (202) 566-6956.

Operational Aspects: Pamela Wenner, Trade Operations (202) 535-4931.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably make them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97-446, 19 U.S.C. 2601 *et seq.*). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. The U.S. is, to date, the only major art importing country to implement the 1970 Convention.

Customs issued regulations to carry out the provisions of the Act as T.D. 86-52, published in the Federal Register on February 27, 1986 (51

FR 6905), which took effect on March 31, 1986. Those regulations were amended by T.D. 90-3, on January 19, 1990 (55 FR 1809), so that the public would have a listing of countries and those T.D.s which contained detailed information on articles for which import restrictions had been imposed under of the Act.

This document amends the listing by adding the name of the State Party "Guatemala" and the description of the archaeological material from the Peten Archaeological Region contained in this T.D. to the regulations. The document further describes the cultural property from the Peten Archaeological Region for which import restrictions exist.

GUATEMALA

Under § 303(a)(3) of the Cultural Property Implementation Act (19 U.S.C. 2602(a)(3)), the Government of Guatemala, a State Party to the 1970 UNESCO Convention, asked the U.S. Government to impose emergency import restrictions on certain archaeological materials from the Peten region of Guatemala. This material, identified as comprising part of Guatemala's cultural patrimony, the record of the Maya culture found in the Peten region, was being pillaged, or is in danger of being pillaged, in crisis proportions. Notice of receipt of this request was published by the U.S. Information Agency (USIA) in the Federal Register on October 23, 1989 (54 FR 43213).

On November 14, 1989, the request was referred to the Cultural Property Advisory Committee, which conducted a review and investigation, and submitted its report in accordance with the provisions of 19 U.S.C. 2605(f) to the Deputy Director, USIA, on February 9, 1990. The Committee found the situation in Guatemala to be an emergency, in accordance with the provisions of 19 U.S.C. 2603(a)(3), and recommended that emergency import restrictions be imposed on archaeological material from the Peten region. The Deputy Director, pursuant to the authority vested in him under Executive Order 12555 and USIA Delegation Order 86-3, considered the Committee's recommendations and made the determination that emergency import restrictions be applied. (See Federal Register, April 15, 1991 (56 FR 15180).)

The Commissioner of Customs, in consultation with the Deputy Director of the USIA, has drawn up a list of types of covered archaeological material from the Peten region of Guatemala. The materials on the list are subject to § 12.104a(b), Customs Regulations. As provided in 19 U.S.C. 2601 *et seq.*, and § 12.104a(b), Customs Regulations, listed material from this area may not be imported into the U.S. unless accompanied by documentation certifying that the material left Guatemala legally and not in violation of the laws of Guatemala.

In the event an importer cannot produce the certificate, documentation, or evidence required by § 12.104c, Customs Regulations, at the time of making entry, § 12.104d provides that the district director shall take custody of the material until the certificate, documentation, or evidence is presented. Section 12.104e provides that if the importer states in writing that he will not attempt to secure the required certificate,

documentation, or evidence, or the importer does not present the required certificate, documentation, or evidence to Customs within the time provided, the material shall be seized and summarily forfeited to the U.S. in accordance with the provisions of Part 162, Customs Regulations (19 CFR Part 162).

These import restrictions of smaller, portable archaeological material are a logical extension of the restrictions imposed by the 1972 Pre-Columbian Monumental or Architectural Sculpture or Murals Statute (19 U.S.C. 2091–2095), which denied entry into the United States of segments of Maya monuments and stelae from the Peten region since May 2, 1973.

ARCHAEOLOGICAL MATERIAL FROM THE: PETEN REGION, GUATEMALA

The Peten Region has yielded pre-Hispanic ceramic, stone, shell and bone artifacts. The Peten region is defined as an area of approximately 40,000 square kilometers which shares a border to the north with Campeche, Mexico and to the east with Belize. To the west, it is bound by the Rio Usumacinta and Chiapas, Mexico and to the south by the Guatemalan Highlands. The archaeological material from the Peten region is part of the remains of the Lowland Maya Culture. As this region is further excavated, it is expected that other similar artifacts may be discovered. The following is a non-inclusive list of types of artifacts which have been identified as originating in the Peten region.

I. CERAMICS

(Dimensions are approximate)

Ceramic vessels and other ceramic forms from the Peten region are decorated with one or a combination of two decorative techniques, regardless of the vessel's color. The decorative techniques are:

- Altering the smooth surface with incisions, punctures channels and similar work, or by adding feet or bases, or handles;
- Adding decorative designs, such as buttons, curls, little faces and similar designs, or especially by painting with two or more colors.

The types of ceramic forms are:

A. *Common Vessels:*

1. Vases with straight or rounded sides, sometimes with 3 feet, pedestal base or lid. Height, 9.9–29 cm.
2. Bowls, sometimes with feet, base, or lid. Height, 8.7–21.5 cm.
3. Dishes and plates, sometimes with 3 or 4 feet. Diameter, 17–62 cm.
4. Jars. Height, 16–38 cm.

B. *Special Ceramic Forms:*

1. Drums. Height, 35–75 cm.
2. Figurines. Height, 5–6 cm.
3. Whistles. Height, 6–15 cm.
4. Miniature vessels. Height, 5–12 cm.
5. Stamps/Seals.

6. Effigy vessels. Height, 16–30 cm.
7. Incense burners.

II. STONE

(Dimensions are approximate)

Moveable stone artifacts from the Peten region are made from the following mineral components:

A. *Jade or green stone, may have traces of red pigment:*
   1. Masks. Height, 14.5–28 cm.
   2. Jaguar figure. Length, 15 cm.
   3. Earplug. Diameter, 3.5–9 cm.

B. *Obsidian:* Length, 3–20 cm.

C. *Flint:* Length, 10–15 cm.

D. *Alabaster or calcite:* Height (vase), 6–23 cm.

III. SHELL

(Dimensions are approximate)

Shell artifacts from the Peten region may be carved or incised into human or animal or other shapes and designs and may have traces of red pigment. Height, 4–6.5 cm; length, 5–32 cm; diameter, 5–7 cm.

IV. BONE

(Dimensions are approximate)

Bone artifacts from the Peten region may be carved or incised into human or animal or other shapes and designs and may have traces of red pigment. Length, 6.5–7 cm.

REGULATORY FLEXIBILITY ACT

Because no Notice of Proposed Rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because this amendment imposes emergency import restrictions on cultural property which is currently subject to pillage and looting, pursuant to § 553(b)(B) of the Administrative Procedure Act, no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is both impracticable and contrary to the public interest.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general and specific authority citation for Part 12 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * * * *

Sections 12.104-12.104i also issued under 19 U.S.C. 2612.

2. **§ 12.104g [Amended]**

§ 12.104g(b) is amended by adding "Guatemala" under the column headed "State Party", the description "Archaeological material from the Peten Archaeological Region forming part of the remains of the ancient Maya culture" under the column headed "Cultural Property", and "91–34" in the column headed "T.D. No."

CAROL HALLETT,
Commissioner of Customs.

Approved: April 10, 1991.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 15, 1991 (56 FR 15181)]

U.S. Customs Service

General Notice

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of the interest rates for overpayments and underpayments of Customs duties. The rates are 9 percent for overpayments and 10 percent for underpayments for the quarter beginning April 1, 1991. This notice is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: April 1, 1991.

FOR FURTHER INFORMATION CONTACT: Robert B. Hamilton, Jr., Revenue Branch, National Finance Center, (317) 298-1245.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621. Interest rates are determined based on the short-term federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

The rates of interest for the period of April 1, 1991 – June 30, 1991, are 9 percent for overpayments and 10 percent for underpayments. These rates will remain in effect through June 30, 1991, and are subject to change on July 1, 1991.

Dated: April 5, 1991.

CAROL HALLETT,
Commissioner of Customs.

[Published in the Federal Register, April 12, 1991 (56 FR 14972)]

U.S. Court of Appeals for the Federal Circuit

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA ELECTRONICS CORP., MATSUSHITA ELECTRIC CORP. OF AMERICA, AND HOSIDEN ELECTRONICS CO., LTD., PLAINTIFFS-APPELLEES *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS-APPELLANTS, AND TANDY CORP., DEFENDANT-APPELLANT

Appeal No. 91–1033 and 91–1052

(Decided April 3, 1991)

William Barringer, Willkie, Farr & Gallagher, of Washington, D.C., argued for plaintiffs-appellees. With him on the brief were *Christopher Dunn* and *Daniel L. Porter*. *Louis S. Mastriani*, Adduci, Mastriani, Meeks & Schill, of Washington, D.C., argued for plaintiffs-appellees. With him on the brief was *Larry L. Shatzer, II*.

George Thompson, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendants-appellants. With him on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel.

Arthur B. Wineburg, Cushman, Darby & Cushman, of Washington, D.C., argued for defendant-appellant. With him on the brief was *Marcia H. Sundeen*.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before MAYER, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MICHEL, *Circuit Judge*.

The United States, the United States International Trade Commission (ITC), and the Tandy Corporation appeal the September 25, 1990 order of the United States Court of International Trade entering a preliminary injunction that bars Tandy's in-house counsel from gaining access to proprietary information disclosed by plaintiffs-appellees to the ITC in the course of an antidumping investigation, to which Tandy is a party. *Matsushita, et al. v. United States, et al.*, 746 F. Supp. 1103 (Ct. Int'l Trade 1990). Because the court did not apply the correct statutory standard in reviewing the ITC's decision, and because the ITC's determination to allow access was based on a correct legal interpretation of the relevant statute and was not arbitrary, capricious, or an abuse of discretion, we reverse.

BACKGROUND

This appeal arises from an antidumping petition, currently pending before the ITC and the Department of Commerce, concerning high-in-

formation content flat panel displays (FPDs). Matsushita Electric Industrial Co., Matsushita Electronics Corp., Matsushita Electric Corp. of America, and Hosiden Electronics Co. (collectively, "plaintiffs"), as well as Tandy, are parties to the proceeding.

On August 1, 1990, Herschel Winn, General Counsel of Tandy, filed an application with the ITC for release to him under an administrative protective order (APO) of business proprietary information disclosed to the ITC in the investigation, as provided for in 19 U.S.C. § 1677f(c)(1)(A) (1988). The ITC granted Winn's APO application on August 2, 1990. On August 3, 1990 plaintiffs filed letters with the ITC objecting to Winn's receiving information under the APO in light of his roles as General Counsel, Senior Vice President and Secretary of Tandy. After reviewing plaintiffs' objections, the ITC affirmed its decision to give Winn access to the information.

Plaintiffs then filed an action with the Court of International Trade, seeking permanently to enjoin the ITC from allowing Winn access under the APO. Plaintiffs also moved for a temporary restraining order (TRO) and for a preliminary injunction. The court issued a TRO. After a hearing on August 15, 1990, the court orally stated that it was finding in favor of the plaintiffs and granting their request for a permanent injunction. In a written opinion issued September 25, 1990, however, the court stated that it was granting only a preliminary injunction, but nevertheless ordered that "the ITC is directed to strike Mr. Winn's name from the list of those eligible to receive confidential information" in the investigation. *Matsushita*, 746 F. Supp. at 1107. Thus, though it labeled its order a preliminary injunction, the court effectively granted the ultimate relief requested.

Tandy, the ITC and the government filed this appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1988). We shall treat the injunction on appeal as a permanent one.

Discussion

The issue presented in this appeal – whether the Court of International Trade correctly determined that the ITC's decision was arbitrary and capricious – is a question of law which we review de novo. *See American Permac v. United States*, 831 F.2d 269, 273 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *Atlantic Sugar v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984). We thus review, in effect, the reasonableness of the underlying decision of the ITC itself. *See American Permac*, 831 F.2d at 273.

The statute governing dissemination of confidential information disclosed in the course of an ongoing antidumping investigation was amended by the Omnibus Trade and Competitiveness Act of 1988 (the "Trade Act") to state that

> the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding * * * available to interested parties who are parties to the proceeding under a pro-

> tective order described in subparagraph (B), regardless of when the information is submitted during a proceeding.

19 U.S.C. § 1677f(c)(1)(A) (1988). The Conference Report on the Trade Act makes clear that the parties authorized to have access to confidential business proprietary information include both retained counsel and, under certain circumstances, in-house counsel: "In determining whether in-house counsel may properly be given access, Commerce and the ITC should be guided by the factors enumerated in *United States Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 623, *reprinted in* 1988 U.S. Code Cong. & Admin. News 1548, 1656. The legislative history thus indicates that Congress intended to adopt the standard for access to information set forth in our decision in *U.S. Steel*.

Similarly, the ITC's regulations regarding APO application procedures incorporate our *U.S. Steel* decision. The regulations specify that an "authorized applicant," from whom applications may be accepted, includes "[a]n in-house corporate attorney for an interested party which is a party to the investigation, if the attorney is not involved in *competitive decisionmaking* as defined in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)." 19 C.F.R. § 207.7(a)(3)(ii) (1990) (emphasis added).

In *U.S. Steel*, we held that access to confidential information could not be denied solely because of counsel's in-house status. 730 F.2d at 1469. Focusing on "the risk of inadvertent disclosure," we concluded that while that risk may in many cases be higher for in-house than for retained counsel, "[w]hether an *unacceptable opportunity for inadvertent disclosure* exists, however, must be determined * * * by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained." *Id.* at 1468 (emphasis added). Although we made no ruling there, we noted that a request might properly be denied in a case "where in-house counsel are involved in competitive decisionmaking," *id.*, a term we defined as

> shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's *advice and participation* in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

Id. at n.3 (emphasis added).

Applying this legal standard to the facts of the instant case, the Court of International Trade accepted plaintiffs' arguments that Mr. Winn's activities in his three roles at Tandy – as General Counsel, Senior Vice President, and Secretary – involved him in "competitive decisionmaking." The court therefore entered an injunction forbidding disclosure, effectively overturning the ITC's decision. Entering this injunction was reversible error.

In the first place, the court did not apply the correct legal standard in reviewing the ITC's determination. The Court of International Trade reviews an ITC decision allowing information to be released to determine whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 28 U.S.C. § 2640(d) (1988) (incorporating by reference 5 U.S.C. § 706). The court purported to follow this deferential standard of review, beginning its analysis with the statement that "[f]or plaintiffs to ultimately succeed * * * they must show that the action of the ITC in granting the APO to Mr. Winn was arbitrary and capricious, or an abuse of discretion." *Matsushita*, 476 F. Supp. at 1104. But the court's opinion, which makes de novo findings on the significance of Mr. Winn's activities and nowhere explains how the ITC acted arbitrarily and capriciously or abused its discretion, belies any deference to the ITC.

This failure to defer to the agency is particularly apparent since the court relied essentially on the same administrative record on which the ITC itself based its decision. This record, consisting of a short application and two letters, dated July 31 and August 7, from Herschel Winn to Kenneth R. Mason, the Secretary of the ITC, as well as two letters from counsel for the plaintiffs objecting to Winn's inclusion in the APO, was supplemented before the Court of International Trade with an affidavit from Mr. Winn. In all his filings, Winn described his duties at Tandy, emphasizing his isolation from competitive decisionmaking: "I am not involved in decisions of pricing and the technical design of a product," Letter from Herschel Winn to Kenneth R. Mason (July 31, 1990), Joint Appendix (Jt. App.) at 31; "My primary responsibilities are legal in nature and my administrative duties are in connection with employee benefit plans."; "I am not involved, nor do I become involved, in selection of vendors or the competitive business terms contained in these purchase orders."; "At [none of the meetings I attend] am I involved in decisions involving competing products or marketing strategies. These kind of decisions are made in Operation Meetings within the company which neither I nor my staff attend."; "My contact with the operating personnel at the factories and in the merchandising department, who make the marketing, purchasing and strategical [sic] decisions, is very minimal and is in the context of a legal problem or an employee benefit matter." Letter from Herschel Winn to Kenneth R. Mason (Aug. 7, 1990). Jt. App. at 46-50. These statements as to Mr. Winn's job responsibilities are entirely unrebutted by any other evidence in the record, and the ITC's letter rejecting plaintiffs' objections stated: "You have provided 16us with no basis for questioning the representations made by either counsel concerning their insulation from competitive decisionmaking."[1] Letter from Kenneth R. Mason to William H. Barringer (Aug. 7 1990), Jt. App at 54.

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[1] The letter's reference to "*either* counsel" reflects the fact that the ITC decision addressed objections to disclosure to inhouse counsel for Hitachi, Ltd. as well as to Mr. Winn. Only the disclosure to Mr. Winn is at issue in the instant case.

The ITC thus focused on the proper legal criterion under 19 U.S.C. § 1677f(C)(1)(A) and 19 C.F.R. § 207.7(a)(3)(ii): whether access under the APO would create an unacceptable "risk of inadvertent disclosure" because the applicant was involved in his company's competitive decisionmaking. Furthermore, assuming that Mr. Winn's unrebutted statements are true – and even the Court of International Trade stated that it "has no reason to, and does not here, doubt Mr. Winn's veracity," 746 F. Supp. at 1106 – they form a reasonable basis for the ITC to conclude that Mr. Winn was sufficiently insulated from competitive decisionmaking that there was no "risk of inadvertent disclosure" sufficient to justify denying him access under the APO. The ITC's decision to grant access to him was therefore not arbitrary, capricious, or an abuse of discretion.

The Court of International Trade, apparently conducting a de novo review of the record, overturned the ITC's determination based on its own assessment that "Mr. Winn's established positions as Senior Vice President and Secretary do not adequately isolate him from the *policymaking elements* of the corporation so as to render the risk of inadvertent disclosure minimal." 746 F. Supp. at 1106 (emphasis added). The court found that his positions brought him into "regular contact" with executives who were "involved in day-to-day pricing and policy decisions," "in the context of what necessarily are *competitive decisionmaking meetings*." *Id.* (emphasis added). These findings are largely irrelevant, since the standard is not "regular contact" with other corporate officials who make "policy," or even competitive decisions, but "advice and participation" in "competitive decisionmaking." Moreover, the finding as to the nature of meetings Winn attended is directly contrary to Mr. Winn's own statements, which the court explicitly accepted as true. Hence, it is both non-deferential and contradictory.

It is a natural extension of the rule enunciated by this court in *U.S. Steel* that a denial of access sought by in-house counsel on the sole ground of status as a corporate officer is error. Indeed, the court's conclusion here even seems to suggest that general counsel are automatically to be denied access to confidential information merely because they have regular "contact" with those who are involved in competitive decisionmaking, a criterion which would disqualify almost *all* in-house counsel and thus effectively constitute the very per se rule we rejected in *U.S. Steel*.

The court's order entering an injunction must therefore be reversed. The injunction is to be dissolved forthwith and the ITC decision and APO granting access to Mr. Winn are to be reinstated.

CONCLUSION

ITC's decision to grant access to proprietary business information to Tandy's in-house counsel was in accordance with the statute and the regulations, properly interpreted in light of our decision in *U.S. Steel*, and was not arbitrary, capricious, or an abuse of discretion. The judg-

ment of the Court of International Trade overturning that ITC decision is therefore

REVERSED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 91–22)

COSMOS INTERNATIONAL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-07-00549

[Plaintiff has overcome the presumption of correctness attaching to Customs' classification of the subject merchandise under item 183.05, Tariff Schedules of the United States. Proper classification is held to be item 166.4040, TSUS.]

(Decided March 28, 1991)

Herrick & Ross (*Peter S. Herrick* and *Fred P. Bingham II*, Of Counsel on the brief), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Nancy M. Frieden*) and (*Sheryl A. French*, United States Customs Service, Of Counsel), for defendant.

OPINION AND JUDGMENT

CARMAN, *Judge*: Plaintiff, Cosmos International ("Cosmos"), contests the classification and liquidation of its merchandise, various forms of "ice pops", pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515(a) (1988).

This Court has jurisdiction under 28 U.S.C. § 1581(a). After careful examination of the evidence presented at trial, the arguments of the parties, the tariff schedules, the case law, and other relevant authorities, this Court holds that the United States Customs Service ("Customs") improperly classified the subject merchandise as "[e]dible preparations not specially provided for (including prepared meals individually packaged) * * * Other" under 183.05, Tariff Schedules of the United States ("TSUS"), at 10% ad valorem and finds the correct classification to be item 166.4040, TSUS, "[b]everages, not specially provided for; Other" at a rate of one cent per gallon.

BACKGROUND

The merchandise consists of thirteen products. Evidence shows that the composition of all of the Cosmos products are essentially identical. The parties have stipulated to the description of the merchandise at issue as follows.

(1) GENIE FRUIT DRINK (Joint Exhibit ("J. Exh.") 3-F)

> This product consists of 7.9 fl. oz. contained in a plastic container shaped like a bottle or jug with a handle, which is ap-

proximately 7″ tall, having a maximum circumference of 8″ and a minimum circumference of 5 1/2″. There is a narrow projection measuring 1 5/8″ from the top to the body of the container. Joint Stipulation ("Joint Stip.") at 3.

(2) PANDA BRAND-FRUITY ICE POPS (J. Exh. 3-G)

This product consists of 6.1 fl. oz. in a cylindrical plastic container approximately 5″ high and 6″ in circumference. There is a narrow flexible tube at the top, extending from the body of the container, which is approximately 5″ long and approximately 1/2″ in diameter. Joint Stip. at 3.

(3) SPACE SHUTTLE FREEZER POPS (J. Exh. 3-K)

This product consists of 7.2 fl. oz. contained, in a plastic container shaped like a rocket which is approximately 7 1/4″ tall, having a maximum circumference of 7 1/2″, and a minimum circumference of 6 1/2″. There is a narrow projection measuring 7/8″ from the bottom to the body of the container. Joint Stip. at 4.

(4) KOALA FRUITY ICE POPS (J. Exh. 3-U)

This product consists of 3 fl. oz. in a plastic container approximately 4 1/2″ high, of varying circumference, and shaped like a koala bear. The container has a narrower projection extending from the top of the head which is approximately 1″ long.

The merchandise is packaged in outer film packaging, which has no instruction for use. Joint Stip. at 6-7.

(5) JUMBO DRINK (J. Exh. 3-R)

This product consists of 3 fl. oz. contained in plastic containers from approximately 6″ to 7″ long with a narrower projection measuring 1 1/4″ from the top to the body of the container. There are four cylindrical-like shapes to the containers including a "banana" and two "bottle" shapes. Joint Stip. at 7.

(6) The following seven exhibits, although named differently, represent the merchandise in cylindrical tubes.

SWISS ALPINE CHOCOLATE FLAVORED ICE	J. Exh. 3-L
POLAR BEAR FRUITY ICE POPS	J. Exh. 3-M
MOUNTAIN SNOW CREAMY ICE POPS	J. Exh. 3-N
MOUNTAIN SNOW FRUITY ICE POPS	J. Exh. 3-O
ALASKA SNOW FRUITY ICE POPS	J. Exh. 3-P
CALIFORNIAN SNOW FRUITY ICE BARS	J. Exh. 3-S
CALIFORNIAN SNOW FROST 'N CREAMY	J. Exh. 3-T

Each of these products consist of 3 fl. oz. in a plastic cylindrical tube approximately 10 1/2″ long with a maximum circumference of approximately 3″. The tube has a waist at the middle which is approximately 2″ in circumference. The tube becomes narrower at the top with that portion measuring 1 1/4″ from the top to the body of the cylinder. Joint Stip. at 4-5.

These products are packaged in outer film packages. The outer packaging provides identification of the product by brand name, identifies the contents, and states instructions for use. *Id.*

(7) CALIFORNIAN SNOW FRUITY ICE BARS (J. Exh. 3-Q)

This product consists of 6 fl. oz. in a plastic cylindrical tube approximately 11 1/2" long with a maximum circumference of approximately 4". The tube has a waist at the middle which is approximately 3 1/4" in circumference. The tube becomes narrower at the top with that portion measuring 1 1/2" from the top to the body of the cylinder. Joint Stip. at 6.

This product is packaged in an outer film package, that provides identification of the product, identifies the contents, and states instructions for use. *Id.*

Customs classified all forms of the merchandise at issue under item 183.05, TSUS, "Edible preparations not specially provided for (including prepared meals individually packaged) * * * Other" at a rate of 10% *ad valorem*. Plaintiff filed timely protests pursuant to 19 U.S.C. § 1514(a) contesting the Customs' classification. Customs denied the protest pursuant to 19 U.S.C. § 1515(a) (1988), and plaintiff then filed a timely summons and complaint leading to the instant action. All liquidated duties have been paid.

CONTENTIONS OF THE PARTIES

Plaintiff claims that the merchandise in its imported condition is a noncarbonated, nonalcoholic beverage and is properly classifiable as a beverage not specially provided for under item 166.4040, TSUS, at a rate of duty of 1 cent ($0.01) per gallon. Plaintiff contends that the products at issue are imported in their liquid state; sold, marketed, designed, and used as a drink; and never consumed in a frozen, solid state. The plaintiff further contends that the imported merchandise is fit for use as a beverage and meets the substantial actual use requirement.

Defendant contends that the merchandise in this case consists of ready-to-freeze flavored liquid in a plastic film for making frozen confections and should be classified under item 183.05, TSUS, as an edible preparation because it is prepared and chiefly used as a human food. The defendant further contends that classification of the merchandise at issue under item 166.4040, TSUS, is incorrect because it does not meet the "fit for use as beverages" standard set forth in the tariff classification. For this reason, defendant argues that the plaintiff has not overcome the presumption of correctness standard that is required to defeat Customs' classification.

The following are the pertinent provisions of the Tariff Schedule:

Customs' Classification:

Schedule 1, Part 15, Subpart B, Headnote 3:

The term *'edible preparations'* in items 182.90, 182.92, 182.96, 183.00, 183.01, and 183.05 [the classification in the instant case] embraces only substances prepared and chiefly used as a human

food or as an ingredient in such food, but such term does not include any substance provided for in schedule 4 (except part 2E thereof) or schedule 5 (except part 1K thereof).

Edible preparations not specially provided for (including prepared meals individually packaged):

183.05 Other ..... 10% *ad val.*

Plaintiff's Claimed Classification:

Schedule 1, Part 12, Subpart B, Headnote 1:

The provisions of this subpart cover only products fit for use as beverages, and do not apply to any product containing 0.5 percent or more of ethyl alcohol by volume or to any product described in subpart A of this part.

166.40 Beverages, not specially provided for ... 1 cent per gal.

166.4040 Other .....

DISCUSSION

Presumption of Correctness:

As in all customs classification cases, plaintiff has the burden of overcoming the statutory presumption of correctness that attaches to the government's classification. 28 U.S.C. § 2639(a)(1) (1988). To determine whether the presumption of correctness has been rebutted, this Court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (Fed. Cir. July 17, 1984).

Fit for Use as Beverages:

The question of whether a particular item fits within the meaning of a tariff term is a question of fact. *Stewart-Warner Corp. v. United States*, 748 F.2d 663, 664-65 (Fed. Cir. 1984). The General Interpretative Rules of the Tariff Schedules (1986) provide:

10. *General Interpretative Rules.* For the purposes of these schedules—

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined.

The Appellate court in *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959) held that "[o]f all things most likely to help in the

determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance."

Chief use means the principal or predominant use, neither exclusive or fugitive or possible use, but the usual and common use. *Franklin B. Howland v. United States*, 53 CCPA 62, 64, C.A.D. 878 (1966); *United States v. The Baltimore & Ohio R.R. Co.*, 47 CCPA 1, 5, C.A.D. 719 (1959). Schedule 1, Part 15, Subpart B, Headnote 3 of the Tariff Schedules defines "edible preparations" of item 183.05, TSUS, by chief use as a human food or ingredient in human food.

Beverages, however, are not classified by their chief use, rather the Tariff Schedule attaches the term "fit for use as beverages" to beverages under Schedule 1, Part 12, Subpart B, Headnote 1. The term "fit for beverage use" is satisfied by a "substantial actual use as a beverage." *Wah Shang Co. v. United States*, 44 CCPA 155, 159, C.A.D. 654 (1957).

In *Wah Shang*, the Court of Customs and Patent Appeals discussed whether merchandise was fit for beverage use. *Id.* A product which had been classified as a medicinal preparation containing more than 20 percent but not more than 50 percent of alcohol had a revenue tax imposed by the Internal Revenue Service pursuant to a provision covering distilled spirits. *Id.* at 156-57. Plaintiff Wah Shang contended that the tax was improperly imposed. The court stated in *Wah Shang* that:

> the term 'fit for beverage use' is not satisfied by a mere possibility of such use, and requires a substantial actual use as a beverage. But the term does not in our opinion require that the chief use of the merchandise shall be as a beverage. It is entirely possible that a liquid chiefly used as a medicinal preparation may also be used as a beverage to an extent sufficient to justify a holding that it is fit for such use. The actions of the collector in classifying the instant merchandise as a medicinal compound, and taxing it as fit for beverage purposes, therefore, were not necessarily inconsistent.

Id. at 159.

Where a product is found to meet the fit for beverage use standard under the Tariff Schedule, then chief use is not required. The court in *United States v. Lorsch & Co.*, 8 Ct. Cust. App. 109, 111, T.D. 36799 (1917) found that "'[a]ctually,' or 'practically,' or 'commercially,' or 'commonly' fit for or used as, in no sense imply or require chief use."

Because the importers have every incentive to know the particular uses to which their merchandise are appropriated, their testimony as to the use should be afforded great probative value. *United States v. Baltimore & Ohio R.R. Co.*, 47 CCPA 1, 5-6, C.A.D. 719 (1959); *see Arbor Foods, Inc. v. United States*, 9 CIT 119, 122, 607 F. Supp. 1474, 1477 (1985) (citing *Klipstein v. United States*, 1 Ct. Cust. App. 122, 124 (1910)).

Plaintiff's witness, Mr. Witt is the president of E.E. Witt Company, a confectionary broker and sales organization. At the time of trial, he had handled Cosmos products for three years. As to the use of the product, Mr. Witt testified that when he sold the Cosmos products to a buyer, he

explained that the products are consumed by drinking them as they melt. Trial Transcript ("Tr.") at 76. He also testified that all of the Cosmos products are consumed by drinking them. He explained the use of Cosmos products by the consumer by stating that:

> [S]ometimes they will put it in the refrigerator and then snip off the top and drink it; other times they will freeze it and then the narrow matter in the middle will be broken in two on the edge of a table. And since it's narrower than the full width of the pop, you can't force it up, so you have to wait until it melts to drink it out. That's the basic difference between a Californian Snow type pop (J. Exhs. 3-L-Q, S, T), which was developed only in the last ten years, to my knowledge, and the Mr. Freeze, which Leaf brought out many years ago.

Tr. at 71-72.[1] Mr. Witt stated that the reason the Cosmos products cannot be consumed in their frozen state is because the hole at the top is far too narrow for any frozen substance to pass through (Tr. at 86) and in order to eat it [Californian Snow (J. Exh. 3-S)] "[y]ou would have to cut it with an ax or something. You would have to take it apart. This is not designed to be eaten; it won't force up to the smaller hole." Tr. at 117.

Plaintiff's witness, Mr. Michael Willis, is a senior import specialist with the U.S. Customs Service. Mr. Willis admitted that he had classified the products at issue both as a beverage under 166.40 and as an edible preparation under 183.05. Mr. Willis testified that it would be very difficult to consume the Cosmos products in their frozen state. Tr. at 196. He thought the Cosmos products were consumed in their frozen state by clipping off the top tube-like protrusions and squeezing the frozen contents out as it melted or became slushy. Tr. at 189. He stated that one of the reasons he classified the product as an edible was because he equated it with a popsicle. Tr. at 198.

Mr. Willis further testified that although he classified items under item 166.40, TSUS, he never determined the meaning of "substantial use" through attaching a degree or frequency of use to it. Tr. at 157. His testimony indicated that a thorough investigation which would normally be carried out in the usual course of business when a particular concern about a classification of a product arises by filing a "6431" request form was never carried through. The National Import Specialist informed Mr. Willis that he/she would not rule on this issue until *Filbin* was decided due to the similarity of the issues. Tr. at 211.

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[1] Defendant's witness, Mr. William M. Lilla, is director of marketing for Capri Sun, Inc. He testified that

> Mr. Freeze brands are artificially flavored liquid preparations packaged in a polyester/polyethylene film. * * * The film construction allows for easy freezing. The film is formed to create a tube-like structure which is designed to allow for easy consumption of the contents in their frozen state. Each tube can be squeezed to extrude small portions of the frozen contents. * * * The plastic tube for freezer snacks is entirely non-functional * * * as a delivery system for a liquid product. * * * The product formulas for freezer snacks are developed around several basic ingredients: water, fructose sweetener (or some other sugar-like sweetener), artificial flavors and coloring, preservatives, solidifiers, and sometimes natural fruit juice.

Tr. at 363-64.

Mr. Freeze is similar to the Kisko product that was the subject of action in *W.R. Filbin & Co. Inc. v. United States*, 14 CIT ___, Slip Op. 90-84 (Aug. 31, 1990). The type of merchandise in *Filbin* consisted of certain products known as "freezer pops". They are packaged in a plastic film that can easily be torn open, thereby allowing the consumer to eat the product in its frozen state. This Court held in *Filbin* that these type of "freezer pops" were to be classified as an "edible preparation" under item 183.05, TSUS.

Furthermore, Mr. Willis testified that he relied on Headquarter Ruling Letters that dealt with various issues of freezer pops, all of which classified freezer pops as an edible preparation. Tr. at 225-27. What Mr. Willis reveals is that he was not familiar with the merchandise at issue in the Headquarter Ruling Letters; in fact, he never saw the merchandise and was not able to describe the merchandise when asked to compare it to the Cosmos products. Tr. at 226.

Defendant's witness, Mr. William M. Lilla, is director of marketing for Capri Sun, Inc. He testified that in order [for Cosmos products] to be used in their frozen state it would be necessary to cut the container below the straw line. Tr. at 455. Mr. Lilla also testified that the Cosmos products were never included in any of his focus groups to determine product use. Tr. at 456. Neither had he conducted any quantitative or qualitative research on the Cosmos products nor witnessed the product being consumed. Tr. at 457.

Mr. Louis Block, defendant's witness, is the president and owner of Bee International, a competitor of Cosmos International. He sells the product "Miami Ice" (Exh. I) which is similar to Cosmos product Californian Snow type freezer bars (J. Exhs. 3-J-Q, -S, -T). He demonstrated consumption of the Californian Snow (J. Exh. 3-5) to the Court at trial. The Court observed the difficulty Mr. Block had with extracting and biting the fully frozen contents of the merchandise. Tr. at 538, 540.

In addition, when Mr. Willis attempted to follow the instructions on the Californian Snow product, he testified that he was unsuccessful. Tr. at 214. The instructions direct the person to freeze the product, break it in half, and share it with a friend. When Mr. Willis attempted this, he testified that the plastic only bent and stretched; it would not break.

As to the use of the Cosmos products, this Court finds that these products meet the substantial actual use standard for beverages set forth in *Wah Shang*. As demonstrated at trial and by testimony, the Cosmos products are presented in a durable plastic container designed for consumption as a beverage and not to be eaten in their frozen state. In addition, this Court finds the analogy used by Mr. Willis comparing the Cosmos products to popsicles to be incorrect. A popsicle, if not eaten, will melt all over ones hand; a Cosmos product if not consumed will retain its liquid state until it is consumed.

Characteristics of a product aid in distinguishing one product from another for classifications purposes. *United States v. National Silver Co.*, 59 CCPA 64, 67, C.A.D. 1040, 455 F.2d 593, 595 (1972). The design of the product is one such characteristic and also a determinative factor. *Quon Quon*, 46 CCPA at 73. Many of the Cosmos products are of a variety of shapes; but all have a commonality, namely, the contents of the products are consumed through either a tube or straw-like projection on the packages or by breaking or cutting the tube at the waist on several of the products. Evidence of the containers of the Cosmos products show that the inside diameter of the straw-like projections and the inside diameter at the waist of the tube-type packages measure approximately

1/8" and 1/4" respectively and are significantly smaller than the inside diameter of the major part of the containers.

Plaintiff's witness Mr. Witt noted that the merchandise in issue was known in the trade as a "freezer pop." He further noted that these type of freezer pops at issue were different from the usual freezer pop because of their design. For example, he described the difference of the design of the Californian Snow (J. Exh. 3-5) with other freezer pops as being designed with a smaller neck to be broken in two, and then basically drunk as a beverage. Mr. Witt testified that if the product was in its frozen state, the children would wait for the product to melt before drinking it. Tr. at 68.

Mr. Witt distinguished the freezer pop known in the trade[2] with the products at issue by testifying that the common freezer pop had a wider top that children would either cut off or tear with their teeth. To get to the contents, the children would push up from the bottom and then eat the product. The Cosmos products, however, are designed with a small neck – the tip of which is broken off. Tr. at 70. The contents in their frozen state, however, will not come out. It is necessary to wait for the product to melt before it is possible to consume it. Tr. at 68.

Mr. Yeh, president of Cosmos International, testified that the design of the product was revolutionary, because each container is equipped with a straw, short or long, to be used for drinking the contents. Tr. at 278. Mr. Yeh testified that the Cosmos products were never designed to be used in their frozen state. He stated that this was obvious by looking at the small opening through the straw on the Cosmos products versus the wide opening of the traditional freezer pops. Tr. at 281-82.

Defendant contends that the tip of the tube is not designed as a straw, but rather it serves a necessary function in the manufacturing process. Defendant's witness Mr. Block testified that the tips of the tube are merely a function of the production process and that they are used to fill the containers with liquid. Tr. 551-52. However, defendant's witness Mr. Lilla, when questioned on the package functionality, admitted that the package functionality of all of the Cosmos products would allow it to be consumed as a beverage. Tr. at 459. Furthermore, Mr. Lilla agreed that there is a difference in the shape and rigidity of the traditional freezer pops compared to the Cosmos products. Tr. at 465.

When plaintiff's witness Mr. Willis classified the merchandise for Customs, he consulted his predecessor and considered the packaging of the merchandise and the design of the item. Tr. at 204-05. He determined that because the products were not free standing and the packaging of the product used such terms as ice and freezer, that they would properly be classified as an edible preparation. Mr. Willis did not attempt to gain additional information as to the use of the product. He stated that he would not know how to obtain that information because it is not part of his job to engage in market research. Tr. at 209.

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[2] The freezer pop which Mr. Witt was referring to is the same type of merchandise at issue in *Filbin*. *See supra* note 1.

Plaintiff's witness, Mr. Witt, testified that the words "freezer," "ice," and "chill" are concepts involving temperature. Tr. at 60. As to the use of the words ice and freezer on the packaging of Cosmos products, plaintiff's witness Mr. Yeh testified that these terms were used to connote temperature because the colder the product was, the longer it would remain chilled. Tr. at 283.

Several of the instructions on the packaging direct the consumer to "chill" or "freeze" for a better taste. This Court notes that these products are marketed for consumption by children as a treat; testimony demonstrated that one of the reasons children freeze the Cosmos products is because "it takes longer to consume." Tr. at 99. Therefore, recommending that it be frozen, does not strip the product of its use as a beverage, because the product is consumed by drinking. The fact that the Cosmos products when frozen are in a solid state does not make this an edible preparation.

Defendant would also have this Court believe that these products should be classified as an edible preparation because they can be consumed during some interval between the physical states of being a solid and a liquid – a state the defendant refers to as "slush" because there are ice particles in the liquid. Testimony at trial from both the defendant's and plaintiff's witnesses reveals that those witnesses thought that the Cosmos products would require an additional ingredient for them to obtain an intermittent state known as "slush". This Court finds that the mere presence of ice particles is not enough to tip the use of the merchandise at issue from a beverage to an edible preparation.

The Court finds through demonstration and evidence submitted at trial that these products are not capable of being eaten in their frozen state because of their design. The evidence drawn from this type of design demonstrates that when the contents of the Cosmos products are in their frozen state, they cannot be pushed through the narrow straw-type openings because the diameter of the openings are smaller than the diameter of the packaging which contains the frozen contents. Furthermore, this Court recognizes the function of the tip of the tube as a filling mechanism; however, the Court finds that the same tip also serves a dual and significant function as a straw.

The construction of the packaging is also a determinative factor in deciding whether the products at issue are substantially used as a beverage.

Government claims that the material used to make the products at issue is a "plastic film." Tr. at 17. Plaintiff's witness Mr. Witt, however, testified that the material used in the manufacturing of Cosmos products is a blow-molded plastic which is a sturdier container than the "flimsy plastic" often used in the manufacturing of various freezer pops. Tr. at 91. Furthermore, plaintiff's witness Mr. Yeh distinguished the traditional freezer pop from the Cosmos products by stating that it was possible to hold the Cosmos products and to drink the contents, whereas a traditional freezer pop could not be held, because if it were all the liq-

uid would spill out. Tr. at 270. Mr. Yeh also testified that the material in the Cosmos products is different, as well as the thickness and the construction of the container. Tr. at 271.

From an inspection of the items, it is obvious to this Court that the material used for the production of the merchandise at issue is more than a plastic film, it is a thicker, more durable plastic. The government relies on the language of the material used in *Filbin* to persuade the court that the products are similar. These arguments are misplaced. The construction and design of the products at issue in this case, with the exception of the ingredients, do not bear a resemblance to the products at issue in *Filbin*. This Court distinguishes the Cosmos products from the products in *Filbin* because the products in *Filbin* have a thin cellophane-type, long rectangular package which permits a frozen stick to be easily pushed up out of the packaging without thawing. Such packaging, as this Court held in *Filbin*, is unsuitable for use as a beverage because it can be eaten in its frozen state. *Filbin*, Slip. Op. 90-84, at 9.

This Court finds that unlike the thin, somewhat fragile and flimsy packaging used for other "freezer pop" products – the type that enable the consumer to conveniently tear open the packaging and easily consume the product as a hard, completely frozen article – the packaging of the Cosmos product is different. The thickness of the inner packaging (compared to other types of packaging used in the *Filbin* case) provides a superior stiffness, toughness, and durability which facilitates consumption as a liquid and discourages easy tearing of the package for access to a hard-frozen content. The more substantial nature of the design, materials, and shapes of the packaging utilized by Cosmos also discourage consumption when fully frozen. Consumption of these products is only possible when the contents are either in a substantially or fully thawed form. The durable plastic, shape and rigidity of the Cosmos packaging, and the method of consumption deem these products fit for use as a beverage.

This Court holds that plaintiff has established that the use of its merchandise as a beverage is "a substantial actual use" as required by the term "fit for use as beverages" in Headnote 1 of Part 12, Subpart B. *Wah Shang*, 44 CCPA at 159. The Court finds that the substantial use of the merchandise is as a beverage.

Conclusion

This Court holds, after having examined the evidence presented at the trial, the relevant statutes and authorities, and upon all other matters presented, that the plaintiff has overcome the presumption of correctness and that Customs incorrectly classified the merchandise at issue as an "edible preparation" under item 183.05, TSUS. It is also the holding of this Court that the correct classification of the merchandise at issue is as a "beverage" under item 166.4040, TSUS, as maintained by plaintiff. Judgment will issue accordingly.

(Slip Op. 91–23)

NAKAJIMA ALL CO., LTD., PLAINTIFF, AND SEARS, ROEBUCK AND CO., INTERVENOR-PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., INTERVENOR-DEFENDANT

Court No. 87-01-00089

MEMORANDUM AND ORDER

[First remand results remanded to the International Trade Administration.]

(Decided April 1, 1991)

McDermott, Will & Emery (*R. Sarah Compton* and *David J. Levine*) for the plaintiff.
Barnes, Richardson & Colburn (*Robert E. Burke, Brian F. Walsh* and *James A. Karamanis*) for the intervenor-plaintiff.
Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Pamela A. Green*), of counsel, for the defendant.
Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *John M. Breen*) for the intervenor-defendant.

AQUILINO, *Judge*: The plaintiff has requested that the court affirm the final results of remand proceedings filed by the International Trade Administration, U.S. Department of Commerce ("ITA") in conjunction with slip op. 90-67, 14 CIT ___, 744 F. Supp. 1168 (1990), and that final judgment be entered in its favor. However, since those results are stated to be based on a clearly erroneous premise, the relief requested cannot be granted at this time.

I

Familiarity with slip op. 90-67 is presumed. In that opinion, the court concluded that, while the ITA has broad discretion in the enforcement of the trade law and its expertise is entitled to deference, its

> decision to investigate Nakajima's costs of production all over again in 1985 was not supported by substantial evidence on the record or otherwise in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B) * * * and this matter [had to] be remanded to the agency for further proceedings * * * regarding the margin of dumping, if any, of plaintiff's merchandise for the period May 1, 1981 to April 30, 1982.

14 CIT at ___, 744 F.Supp. at 1177.

The intervenor-defendant interposed a motion for rehearing, arguing, among other things, that the court's decision "amount[ed] to an 'exclusionary rule' unprecedented in the administrative context of the antidumping law." The defendant, as well 3 as the plaintiff and intervenor-plaintiff, opposed the motion, with the government summarizing its viewpoint as follows:

> In its motion for rehearing, Smith-Corona essentially argues that (1) even if [it] had not alleged sales below cost, Commerce would

> have still been compelled to verify Nakajima's cost of production data because of a need for verified cost data for adjustments for differences in physical characteristics of the models being compared; and (2) the Court's opinion created an unwarranted "exclusionary rule." Neither argument supports a motion for rehearing.
>
> Admittedly, Commerce required cost data for adjustment purposes. However, the cost of production investigation in issue was not conducted for the purpose of obtaining cost data for adjustment purposes. It was conducted in order to determine whether Nakajima's sales of PETs in the home market during the review period were made at prices which were below the cost of producing the PETs. Consequently, Smith-Coronas argument does not point to any legal or factual error which is crucial to the Court's opinion.
>
> We do not consider the Court's opinion as creating any "exclusionary rule." We read the opinion as merely holding * * * that, if [Smith Corona] were now permitted to submit additional data, the credibility of its market research report could be restored.[1]

After careful consideration of this and the other arguments presented, the court concluded that no grounds existed for the grant of rehearing, and an order was therefore entered, denying intervenor-defendant's motion.

II

The ITA's subsequent Final Results of Redetermination Pursuant to Court Remand conclude, based on the parties' comments "and the existing administrative record * * * that the revised weighted-average margin for Nakajima for the period May 1, 1981 through April 30, 1982 is 0.0024 percent." In reaching this result, the agency states that in

> accordance with the [court's remand] order we have completed the analysis of Nakajima All Co., Ltd. ("Nakajima") using the home market sales data submitted * * * in its amended questionnaire response of March 11, 1983, rather than using the best information otherwise available.
>
> * * * * * * *
>
> The CIT directed the Department to rely on the data submitted by Nakajima rather than use BIA.
>
> In our revised analysis we have removed all of the BIA data originally used for the home market analysis and inserted sales data from Nakajima's amended questionnaire response of March 11, 1983. Sales data were entered on the computer program for models 7500, 8500, 8600, and M100, and margins were calculated based on Nakajima's sales data. We made no change to the foreign market value calculated in the January 14, 1987 final results for model 8800C. The calculation of U.S. price for all five models is the same as that employed in the original analysis.

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[1] Defendant's Opposition to the Motion Filed by Smith-Corona Corporation for Rehearing, pp. 4-5 (footnotes omitted).

> We made adjustments to the foreign market value for Japanese inland freight, the difference between packing for sale in Japan and packing for sale in the United States, differences in merchandise, and differences in credit.

Clearly, the statement that this court directed the Department to rely on data submitted by Nakajima rather than use the best information otherwise available is erroneous, and this mis-apprehension appears to be the linchpin of the outcome on remand. For example, in its instant request for affirmance, the plaintiff argues that, "[a]s correctly stated in ITA'S remand determination, the Court directed ITA to rely on the sales data submitted by Nakajima rather than use BIA."

If, as alleged by the intervenor-defendant in its motion for rehearing, slip op. 90-67 is not perfectly clear, nonetheless that decision nowhere contains the direction claimed. Indeed, the opinion makes specific mention of the ITA's "broad discretion in the enforcement of the trade law" and also that its expertise, including how best to proceed on remand, is entitled to deference. This being the legal standard, it was the premise of the court's order.

In its opposition to rehearing, the defendant had little difficulty dispelling the purported creation of an exclusionary rule. Of course, there could be, and therefore was, no such ruling. But then, the ITA apparently proceeded with the remand as if there had been. In its opposition to rehearing, by way of example, the defendant had argued that,

> given the fact that this Court has determined that Commerce should not have initiated a cost of production investigation in this case, new evidence should not now be submitted to Commerce in order for it to reconsider this issue.[2]

Suffice it to state now that slip op. 90-67 held only that the ITA could not have initiated a cost-of-production investigation based on the record then in existence. As for what the agency should have done after remand, if any party was effectively precluded from providing information which might shed light on the margin of dumping of plaintiff's merchandise for the period under review, those proceedings were not carried out in accordance with the law of this case. That is, on the record at hand, the court cannot conclude otherwise, nor is it able to conclude that, if the ITA excluded information, such exclusion constituted harmless error. Hence, a second remand is necessary – to afford the agency an opportunity to receive and consider whatever data the parties may possess and which bear on the ultimate question presented for redetermination.

The ITA may have 45 days from the date hereof to reconsider the question and to report the results thereof to the court, whereupon the plaintiff and intervenor-plaintiff may have 20 days in which to respond, and the defendant and the intervenor-defendant may have ten days to reply thereto.

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[2] *Id.* at 6.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSEI
C91/69 3/26/91 Aquilino, J.	Time Electronics Corp.	83–5–00723	716.09–716.45 715.05 Various rate
C91/70 3/26/91 Aquilino, J.	World Forum Watch, Ltd.	83–4–00548	716.09–716.45 715.05 Various rate
C91/71 3/28/91 Carman, J.	Behring Int'l	82–6–00804	668.04 6.4%
C91/72 3/28/91 Tsoucalas, J.	Nikon, Inc.	90–3–00136	708.2340, 708. or 708.8000 Various rate
C91/73 3/28/91 Carman, J.	Noss Co.	84–2–00223	668.04 Various rate
C91/74 3/28/91 Carman, J.	Noss Co.	84–5–00607	668.04 Various rate
C91/75 3/28/91 Carman, J.	Noss Co.	84–3–00319	668.04 Various rate

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
5, or tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
5, or tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	661.95 5.1%	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Houston Radiclones and parts
8.7300 0 tes	832.00 Free of duty	Agreed statement of facts	Los Angeles Microscopes
tes	661.95 Various rates	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Jacksonville Radiclones and parts
tes	661.95 Various rates	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Memphis Radiclones and parts
tes	661.95 Various rates	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Portland Radiclones and parts

C91/76 1/28/91 Carman, J.	Rogers & Brown Customs Brokers	81–12–01681	668.04 Various
C91/77 1/28/91 Carman, J.	Union Camp Corp.	82–6–00802	668.04 Various
C91/78 1/29/91 Aquilino, J.	E. Gluck Corp.	86–11–01446	716.09–7 715.15 Various
C91/79 1/29/91 Aquilino, J.	E. Gluck Corp.	86–5–00601	716.09–7 715.15 Various
C91/80 3/29/91 Tsoucalas, J.	Hyde Athletic Industries, Inc.	89–3–00160–S	700.95 12.5%

us rates	661.95 Various rates	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Charleston Radiclones and parts
us rates	661.95 Various rates	Noss Co. *v.* U.S., 753 F.2d 1052 (1985)	Norfolk Radiclones and parts
716.45, 5 etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5 etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	A791.90 Free of duty	Agreed statement of facts	Boston Footwear

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